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Supreme Court of the United States

OCTOBER TERM, 1959

No. 614

R. M. STRICKER,

Petitioner,

versus

J. P. MORGAN, ET AL., (Mrs. Margaret Koehler Morgan, Edward C. Morgan and Evelyn Morgan Wiemer, substituted as Respondents in the place and stead of J. P. Morgan, deceased),

Respondents.

BRIEF ON BEHALF OF PETITIONER IN RESPONSE TO BRIEF OF RESPONDENTS OPPOSING PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF.

Reply to Respondents' Opening Statement.

Nothing could be further from the truth than the opening statement of Respondents in their opposition to the

Petition for Writ of Certiorari. This is not a case of someone trying to assert a claim to land after oil production has been obtained. Stricker has always asserted his claim to the land, including timber, oil and all mineral rights concomitant with an ownership of an undivided one-half interest thereon or a right to be vested with an undivided one-half interest as an incident to an accounting and division of profits. The contrary of that stated by the Respondents is true, for, whereas the documentary evidence clearly shows that Morgan initially recognized Stricker's rights, it was only when the value of the land for oil and mineral production became apparent that Morgan proceeded in a manner designed to defraud Stricker of his rights.

The Respondents have tried to put the shoe on the wrong foot. Contrary to that stated by Respondents, the outstanding and recognized fact is that of the total of eleven purchases of land and, in some instances, of timber without acquiring the fee to the lands both in Mississippi and in Louisiana, the Esperanza purchase transaction is the only one in which Stricker was not accorded by Morgan a just and equitable share with Morgan in all profits and it is to be noted that the Esperanza purchase was the *only one from which oil has been produced.*

There was not fifteen years delay; for Stricker had no right to demand an accounting or conveyance to him until in the year 1947. The actions of Morgan to implement his design to defraud Stricker is established by the testimony of handwriting expert George Lacey tes-

tifying with reference to alterations made on Morgan's ledgers[1] (Plaintiff's Exhibit 47 and with particular regard to Ledger Sheet 74, a part of Plaintiff's Exhibits 47 and 48), the making and opening of new and different ledger sheets and the changes in accounting procedure as evidenced by the statement of Louisiana Box & Lumber Company dated December 31, 1943.

Respondents say that Petitioner has ignored the entirety of the evidence in the statement of facts contained in his Petition for Writ of Certiorari and refers to the findings of fact and other factual statements contained in the opinions of the trial judge and of the Court of Appeals. It is the court findings of fact which the Petitioner declares is contrary to undisputed documentary evidence and totally unsupported by any evidence, as the Court will readily perceive when it reviews this record.

There is no evidence in this record that by virtue of the deed from Campbell into the name of Morgan, Stricker acquired a right to anything less than a full one-half interest in the Esperanza Plantation, in its entirety, in equity.

It is judicially admitted of record by Respondents that upon and by virtue of the acquisition of Esperanza Plantation by the deed from Campbell (conveyance of it into Morgan by name), Stricker acquired some interest in that property, an "immovable", and that such was by virtue of the agreement between Stricker and

[1] R. Vol. 6; pages 1038-1051 and exhibits therein referred to

Morgan pursuant to which that property, in its entirety, was purchased, in fee.[1a]

Respondents say that the agreement by and between Stricker and Morgan, pursuant to which the Esperanza Plantation was purchased, was that Morgan was to own the land and that Morgan and Stricker, together, were to own the timber standing on the land. But there *is no evidence in this record of any such limiting or modifying agreement.*

By their aforesaid Judicial Admissions of Record, Respondents admit that there is and was no impediment under Louisiana law that prevented Stricker from acquiring, *ab initio*, an interest (enforcement by recourse to equity) in the standing timber (an immovable) on Esperanza Plantation. Ergo, it follows, there could have been none to prevent Stricker from acquiring, *ab initio*, a like equitable interest in and to the entirety of said Plantation.

Evidence in this record that *ab initio* Stricker became entitled to *some* interest in Esperanza Plantation (an immovable) includes:

(1) The evidence of their original profit and loss sharing agreement.

(2) Their course of dealings with each other over the years.

[1a] R. Vol. 4, pp. 693-694

(3) That Stricker discovered the timber for sale, had it cruised and made the purchase offer for benefits of Stricker and Morgan in 1940.

(4) Stricker participated in negotiations for the purchase of the property in Morgan's name in 1940.

(5) Stricker negotiated for sale of some of the timber in 1947 by procuring competitive bids.

(6) Morgan's Louisiana Box & Lumber Company made a competitive bid to Stricker and Morgan for the timber in 1947.

(7) Stricker negotiated the timber sale to the successful bidder, General Box Company, in 1947.

(8) Stricker and Morgan divided equally the profits attributable to the 1947 timber sale.

(9) The judicial admissions of record hereinabove referred to. (Stricker's rights were not created by such admissions. They existed, *ab initio*, from the date of original purchase of the Plantation from Campbell.)[1]

(10) Other matters in this record hereinafter referred to.

Evidence in this record that *ab initio* Stricker became entitled to a full and equal share or interest with

[1] For supporting documentary evidence see Appendix 2504-B and Appendix VII to Petition for Writ.

Morgan in Esperanza Plantation, in the entirety, includes:

(1) All of the matters immediately above referred to; and:-

(2) At time of purchase in 1940 it developed that the timber could not be acquired from Campbell, or otherwise, separately from the land in its entirety.

(3) In accord with their custom in other instances, the land in its entirety was purchased in the name of Morgan.

(4) The amount paid was increased, of necessity, but all checks issued for the purchase bore the same endorsement of the purpose for which each was issued.

(5) Thereafter this purchase transaction and the property in its entirety was handled by the parties just as had been handled all others of their purchases made pursuant to their original profit and loss sharing agreement.

(6) Stricker negotiated the oil leasing and exercised general supervision over the property.

(7) Many other matters of record herein mentioned and referred to.

For supporting documentary evidence see Appendix 2504-B and Appendix VII to Petition for Writ.

The only evidence to rebut the conclusion that *ab initio* Stricker became entitled to a full and equal share or interest with Morgan in the property, in its entirety, is: That thereafter Morgan sought to dispute Stricker's claim and sought by devious means to avoid his obligation to accord to Stricker a full and equal participating share therein.

Stricker's rights having become vested *ab initio*, same could not be avoided by subsequent disputations.

Reply to that said by Respondents Relative to Judicial Proceedings.

We are cognizant of the rule that an appellate court will not disturb the findings of fact of a trial court or an intermediate appellate court where same is found to be supported by any competible evidence unless contrary to the great weight of the evidence or unless such findings are not supported by any evidence. But, we invoke with equal emphasis the rule that where there is no factual dispute shown by the record and where the evidence is documentary, not dependent upon the advantage of the trial court by its own opportunity in the trial court to observe the demeanor of witnesses, that appellate courts are free to review the facts and independent adjudication thereon.

Petitioner declares that the lower courts' fact findings are (1) contrary to the undisputed evidence in this case, (2) were induced by an erroneous view of the applicable law, and (3) that the essential evidence in-

this case is *wholly documentary* and that such oral evidence as there is in this record was by witnesses whose testimony was explanatory and interpretive of the documentary evidence offered by the parties.

Hence the rule invoked by Respondents seeking to prevent this Court from reviewing this record because of the lower courts' fact findings is not applicable.[2]

As the court stated in *American Propeller & Manufacturing Co. v. United States* (*Supra*, footnote 2):

> "—the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Contrary to the findings of fact, we submit the following:

There was from the beginning a "partnership" agreement between Stricker and Morgan.[3]

Stricker knew and understood at all times that he was entitled to become vested with an interest in the land when all costs had been recovered by Morgan.[4]

There was an agreement between Stricker and Morgan concerning the original acquisition and subsequent operation of Esperanza Plantation, and such agreement was

[2] 3 Am. Jur. Verbo "Appeal & Error", Sec. 899, pp. 463-464, and case cited in footnote: American Propeller & Manufacturing Co. v. United States, 300 U. S. 475; 81 L. Ed. 751 (1937).

[3] Appendix 2504B, p. 3.

[4] Appendix 2504B, p. 63.

evidenced and did arise from the course of dealings between the parties,[1] and as evidenced by their correspondence pertaining thereto.

Stricker at all times claimed and understood that he had an interest in and was entitled to become vested with an interest in Esperanza Plantation beyond (and hence including) an interest in and a right to participation in the profits from the timber.[2]

The only instance shown by this record where Stricker received a commission or bonus from others pertaining to properties in which both Stricker and Morgan were interested was the instance where Stricker in association with Dale was assembling a large block of lands for mineral leasing, which block included a tract in which Stricker and Morgan were both interested. Stricker shared commissions for assembling this block for an oil company with Dale but procured for himself and Morgan a better consideration for their lease than was paid to other property owners in the block. Stricker's action in this respect was in no way antagonistic or disadvantageous to Morgan and indeed Stricker was acting in the best interest of Morgan.

Witness Morgan's bookkeeper Owen was led to say that certain payments made by Louisiana Box & Lumber Company to Stricker were commissions, but all were shown to have been sums accruing to Stricker for purchases of logs from properties of others (in which

[1] Plaintiff Exhibits "6" (Apx. 2 Vol. 204 B p. 37) [illegible]
[2] Appendix 250 B. p. 62

neither Stricker nor Morgan were interested owners) except payments that were shown to have been made to Stricker to refund to him for expenditures for log rafting costs in getting out timber.[7]

In all of the many transactions entered into between Stricker and Morgan they always shared on an equal basis both as to profits and losses.[8] In not one instance has it been shown by any documentary evidence or testimony in this cause that Stricker conducted himself as a broker or middleman and accepted a commission or bonus from others.[9]

Inasmuch as Stricker always kept his books on a "cash basis" for income tax purposes, it was not necessary that he either treat within his books and records or upon his income tax returns income received from the various transactions had between him and Morgan as partnership income.[10] There is nothing in the record which would show that Stricker and Morgan conducted their relationship between each other other than as they designated it as a "partnership".[10] Each transaction

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[7] Record Vol. 7, p. 1243; 1302-1310; Record Vol. 7, pp. 1310-1329; Record Vol. 8, pp. 1705-1566 (Walgin Grove); R. Vol. 8, pp. 1579-1587, R. Vol. 9, pp. 1628-1639 (McKellar Timber); R. Vol. 9, pp. 1630-1611 (Hamlet's); R. Vol. 9, pp. 1611-1652 (Kentzer Cured Timber); R. Vol. 9, pp. 1652-1671 (Antonish); R. Vol. 9, pp. 167[illegible]-1675 (Stockert's); R. Vol. 9, pp. 16[illegible]-1[illegible] (Point Breeze timber); R. Vol. 7, pp. 1211-1216, 1311 and Pl. Ex. 90, R. Vol. 9, pp. 1786 (Cole's Creek); R. Vol. 9, pp. 1761-1775 (Woodlawn); R. Vol. 9, pp. 1779-1781 (Mockie timber).

[8] Record Vol. 12, pp. 2203-2213.

[9] Appendix 2501B, p. 37; Pl. Ex. 75 sheet 2; Pl. Ex. 133, sheet 2; Pl. Ex. 113, sheets 15, 16, 35, 36; Pl. Ex. 122, sheets 9, 11; Pl. Ex. 106, sheets 1 & 2; Appendix 2501B, p. 35; Appendix VII, p. 57; Pl. Ex. 152, sheet 19; Pl. Ex. 107, sheet 1; Pl. Ex. 111, sheets 19-20, 30-31; Pl. Ex. 113, sheets 15-16, 35-36.

was entered into between Stricker and Morgan based on their original agreement on a profit and loss sharing basis.[11]

There was no occasion for Stricker to make reference to Esperanza Plantation in his 1948 letter to the Internal Revenue Service, since that related solely to cash income by him received from oil, gas and mineral leases. Similarly, there being no occasion to do so, Stricker did not include reference to any other tract of land in which he owned minerals but from which for the related period he had received no cash income.[12]

The record title to Esperanza Plantation was vested in Morgan in accordance with the long standing agreement between the parties as to the other properties, until Morgan had been reimbursed the costs of acquisition. At no time prior to the institution of this suit was any possession or dominion of the property exercised by Morgan exclusive of Stricker's rights. At all times from date of purchase Stricker managed the property, negotiated the mineral lease, negotiated the sale of timber, had the property lines surveyed and paid one-half of the cost, and exercised general management and supervision, negotiated grants of pipe line rights-of-way and for surface damage done to the property, and by Morgan was brought into negotiations for granting of sites for the drilling of wells to be bottomed under adjoining properties. Physical possession of the

[11] Appendix 2501B, pp. 1-3.
[12] Footnote 9, supra.

property at all times was had through the activities of Stricker.[13]

Stricker by documentary evidence and testimony of witnesses interpretative and explanatory of documentary evidence established his right to the relief he sought in this suit, which evidence in this record is not contradicted.

The only inferences which can be drawn from the evidence in this record are those which are in accord with the facts alleged in the original complaint.

No record references were made by the District Court or by the Circuit Court of Appeals in their respective opinions, nor by Respondents in their brief to support any of the lower courts' findings of fact.

The lower courts' fact findings appear to have been induced by the erroneous conclusion of law that it was necessary for Stricker to prove the existence of a *"general partnership agreement"* between him and Morgan. No such "general partnership" encompassing all business activities of the respective parties was alleged nor was any such essential to Stricker's right to an ac-

[13] Pl. Ex. 98, sheets 1-7, Appendix 2504B, pp. 50-58; Pl. Ex. 97, Appendix 2504B, p. 60-61, Pl. Ex. 101, Appendix 2504B, p. 62; Appendix 2504B, p. 63, Pl. Ex. 115, sheet 5; Appendix 2504B, p. 65-72; Pl. Ex. 116, sheet 1, 3, 6, 7; Appendix 2504B, p. 72, Pl. Ex. 117, sheet 3; Appendix 2504B, p. 75-78, Pl. Ex. 119, sheets 1, 4-6; Appendix 2504B, p. 80, Pl. Ex. 120, sheet 1; Appendix 2504B, p. 106-110, Pl. Ex. 132, sheet 1-5; Appendix 2504B, p. 112-116, Pl. Ex. 133, sheet 1-6; Appendix 2504B, p. 111, Pl. Ex. 183; Appendix 2504B, p. 73, Pl. Ex. 118.

counting and division of profits under the contracts and agreements shown to have existed between them and under their relationship to one another and all of their transactions, including that specifically applicable to Esperanza Plantation.

Petitioner's Reply to Respondents' Contention that the Louisiana Law is Solely Applicable to this Case.

Petitioner does not quarrel with the general principle that instruments *affecting the title* to real estate must be governed by the laws of the state in which it is situate. But the Respondents seek to have this Court overlook the fact that this action is one primarily for an accounting, division of profits, and to require that Petitioner be vested with an interest in the realty in furtherance of the division of profits, under all of the equities invoked by the original agreement pursuant to which all of the transactions between the parties were entered into,[14] and pursuant to which Esperanza was purchased, managed and handled. The course of dealings between the parties extending over a period of many years and the writings and the writings which are exhibits in this record evidence the rights and obligations of the partes inter se.

Respondents would have this Court ignore the fact that throughout the entire course of their dealings with one another, including that pertaining to the management and control of Esperanza Plantation, negotiations for mineral lease thereon, the division of profits ac-

[14] Appendix 2504B, p. 3.

crued from so much of the timber as was sold therefrom, they did contract and act in accordance with the principles of common law jurisprudence of the State of Mississippi with reference to which the initial contract was made and that whether the property (in every instance realty) was situate in Mississippi or Louisiana.

We are not here speaking of the law applicable to that instrument whereby Esperanza Plantation was conveyed by the former owner Campbell to Morgan. Louisiana law must apply to that instrument. We are speaking of the contractual and equitable rights and obligations between Strickey and Morgan arising out of the purchase; and it becomes immaterial whether the final necessitous decision to purchase the land as well as the timber had its final consummation in Mississippi or Louisiana since the laws of both states recognize and apply equitable principles.

The original profit and loss sharing agreement entered into between the parties had its inception in the acquisition of realty situate in Mississippi and the evidence is conclusive that the parties contracted with reference to common law and equtable jurisprudence and thereafter in all of their transactions continued to contract and deal with each other similarly. These principles of law governed the parties whether the relationship was that of partnership or of joint adventurers or whether under common law and equitable jurisprudence or the Louisiana Civil Code (Louisiana Civil Code. Article 21) Morgan is to be treated as holding title in trust and thereby compelled to do equity

upon an accounting for profits. That relationship existing between the parties and under which this Petitioner is entitled to relief in every instance in this record is evidenced by writings and in no respect whatsoever does same depend upon proof by parol.

Throughout their writings these parties denominated their relationship as being one of *partnership*. In their purchases and sales of land or timber from lands and in farming operations and in cattle operations and in all respects they shared profits and losses equally and dealt with each other as partners. The Mississippi courts have given revealing effect to the intent of the parties to a contract in determining what law is to govern the mutual rights and liabilities of partners, of joint adventurers and of those cast in the position of trustee to enforce equities.

In this discussion we shall show that those decisions are not out of harmony with the decisions of the Supreme Court of the State of Louisiana.

The prevailing general rule is that "the law of the place where a partnership is entered into generally governs the mutual rights and liabilities of the partners".[15]

[15] In the above mentioned text the Louisiana case of *Baldwin v. Gray*, 4 Mart. N.S. (La.), 192 Am. Dec. 169 is cited.

"The obligation of partners and of a principal and his agent as between themselves are determined

Conflict of Laws, 11 Am. Jur., Sec. 28

by law of the place where the agreement of partnership or agency was made"[16]

In the comment under the above statement it is said

"Although a partnership is created by a contract between the parties, the relationship of principal and agent is not necessarily so created. Both the relationship of partnership and that of principal and agent, however, are made by an agreement between the parties. Such an agreement involves a manifestation of willingness to enter the relationship by one party and an acceptance thereof by the other. If the relationship is created by an agreement which is binding as a contract, the obligations of the parties as between themselves are governed by the laws of the place of contracting. If the agreement does not constitute a contract, the obligations of the parties as between themselves are governed by the laws of the place of agreement."

"It seems, and most of the critics are agreed, that matters of validity which go to the very basis of the making of a contract involve primarily the law of the place where the contract is made—

"The trend—among the authorities and treatises—seems to be toward accepting the law of the places of making as governing the validity and construction of a contract. In the interest of practicality and uniformity some one rule should be recommended. This rule seems to be the most logical"[17]

The Supreme Court of Mississippi, whereas it recognizes the force of the above statement, yet adheres to

[16] Am. Law Inst. Restatement, Conflict of Laws, Sec. 342
[17] Conflict of Laws, Am. Jur., Sec. 116

the "rule of intent of the parties" as controlling over the *lex loci* contractus. Such is the holding of the Supreme Court of Mississippi in the case of *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, 71 A.L.R. 741, wherein it was said:

> "It may be that the rule which applies the lex loci contractus to the validity of contracts made in one state to be performed in another is the more logical, and it would seem that the law either of the place of making, or of performance, should apply absolutely, without reference to the intention of the parties; but *the intention rule* is too firmly fixed in the judicial history of this state to be now changed by judicial action." (Emphasis supplied.)

Further referring to the treatise on this subject in American Jurisprudence[1] we find this statement:

> "It is a familiar rule that the construction and validity of a contract are governed by the law of the place where it is made."

Numerous Louisiana and Mississippi decisions are cited in support of the above statement as well as many decisions of the United States Supreme Court and other federal cases as well as decisions from most of the other states of the Union.

> "The foregoing rule is based on sound reason as well as authority. While persons have their places of domicile and property has its situs, it is clear that apart from the law itself in contemplation of which either expressly or impliedly a contract is made, there is nothing of a discernible nature and

[1] Conflict of Laws, 11 Am. Jur., Sec. 117.

can serve to aid the courts in determining the complicated questions of conflict that continually arise. There is obviously no difficulty where the domicile of the parties, the situs of the property involved, and the place of execution and performance of the contract are all in one jurisdiction. It is only when the law relating to any one or more of the essential incidents of a contract—domicile of the parties, situs of property or jurisdiction of matters involved, place of execution, and place of performance—is different from the law that obtains as to some or all of its remaining incidents that questions arise. *Accordingly, a contract valid where made is, as a rule, valid everywhere; and a* contract invalid where made is invalid everywhere.'" (Emphasis supplied.)

"The validity or invalidity so determined will generally be recognized wherever it is sought to be enforced, even though the law of the forum would have determined otherwise if applied."[28]

The Louisiana case of *Saul v. His Creditors*, 5 Mart. N.S. (La.) 569, 16 Am. Dec. 212, is cited in support of the above statement, as are numerous other cases from other jurisdictions.

We have already referred to the fact that the courts of the State of Mississippi have given greater effect to the intent of the parties in determining the applicable law with reference to which the parties have contracted

[28] Conflict of Laws, Am. Jur., Sec. 117; *Ivey v. Lalland*, 42 Miss. 141, 97 Am. Dec. 475, 2 Am. Rep. 606; *Galliano v. Pierre*, 15 La. Ann. 10, 89 Am. Dec. 643; *Puckner v. Watt* 19 La. 216, 36 Am. Dec. 671; and numerous other decisions cited.

[29] Conflict of Laws, 11 Am. Jur. Sec. 117.

and which is to govern their rights and liabilities to each other.

For a discussion of this rule we refer the Court to Conflict of Laws, 11 American Jurisprudence, Section 119, and quote certain excerpts therefrom:

> "Under one theory the conflict between the various rules and theories that have been stated is more apparent than real, since the majority of them, perhaps, may be reconciled by the application of another rule, namely, *that the true test for determination of the proper law of a contract is the intent of the parties and that this intent, whether expressed or implied, will always be given effect* except under exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law."[21] (Emphasis supplied.)

The foregoing statement in the text is supported by citation of innumerable authorities, including a number of decisions by the Supreme Court of Mississippi.[22]

Under the aforesaid text there is also cited the Louisiana case of *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281.

> "Under this theory the rules governing this subject may be considered as merely guiding principles for the determination of the intent of the parties. It is generally agreed that the law of the place where the contract is made is prima facie that

[21] Conflict of Laws, 11 Am. Jur., Sec. 119.

[22] *Castleman v. Canal Bank & Trust Co.*, 171 Miss. 291, 156 So. 618; *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, 71 A.L.R. 741; *Shannon v. Georgia State Building & Loan Assn.*, 78 Miss. 955, 30 So. 51, 57 L.R.A. 800, 84 Am. St. Rep. 657.

which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail, in the absence of circumstances indicating a different intention.—

"The parties may, under this principle, readily adopt any law as that of the contract; and if the adoption is bona fide and devoid of fraud, the entire transaction will be governed by such law in accordance with the intent of the parties, regardless of where the contract is actually made.

"It is a rule that if the place of performance is different from the place where the contract is made, *the* presumption is that the former is intended to apply."[23] (Emphasis supplied.)

The Petitioner has at no time in this case tried to prove title to realty by parol, for all of the proof in this case is by documentary evidence and by witnesses whose testimony was interpretative and explanatory of the documentary evidence. There having been a profit made above losses and the land remaining representing all profits that have not heretofore been divided, Stricker is entitled now to be vested with title, his right to be so vested is evidenced in this case not by parol but by documentary evidence.

[23] Conflict of Laws, 11 Am. Jur., Sec. 119.

Petitioner's Reply to Respondents' Proposition that "There Must be a Writing" and that "There Could Have Been no Partnership or Joint Adventure in the Esperanza Lands in Louisiana" without there having been Between the Parties Written Articles of Agreement made by Authentic Act.

Respondents devote a considerable portion of their brief in support of the proposition that in Louisiana title to realty cannot be established by parol evidence. As stated in the Petition filed herein, Petitioner throughout this litigation has never attempted to prove his right of recovery as prayed for by parol evidence. In briefs and upon oral argument in both lower courts, Petitioner has emphatically urged that his claim asserted in this proceeding is not based on parol evidence but is based entirely on written instruments, letters, documents, accounts and other writings. Notwithstanding this strenuous effort on the part of Petitioner to convince both lower courts that Petitioner was relying solely on those *writings*, the courts in each instance have based their opinions on the principle of law that title to real in Louisiana cannot be established by parol evidence. The lower courts have completely disregarded the well established jurisprudence of Louisiana construing and interpreting Articles 21, 2292, 2293 and 2294 of the Louisiana Civil Code and the decisions of the Louisiana Supreme Court construing and interpreting these articles, all as is completely set forth in the Petition for Writ of Certiorari filed herein at pages 30 to 44. Therefore, it is clear that both courts below have so far departed from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision.

Respondents in their brief opposing the Petition for Writ of Certiorari have referred to the decision of the Louisiana Supreme Court in the case of *Stack v. DeSoto Properties*, 221 La. 384, 59 So. (2d) 428 (1952), by saying that the Louisiana Supreme Court refused to substitute the letter involved in that case for the requirement that all transfers of property in Louisiana must be in writing. It would appear from their statement that they have not read this decision, as the court did not refuse to substitute the letter involved in that case for the requirement that all transfers of property in Louisiana must be in writing. To the contrary, the Louisiana Supreme Court said:

> * * * Recognition of plaintiff's right to an interest in the property is plainly provided to be contingent upon a recoupment of the advances by the syndicate members prior to the due date of the last maturing purchase payment note."

As stated by the Louisiana Supreme Court in that case, plaintiff's petition did not allege nor was it shown by the evidence that the condition in the letter upon which plaintiff was to receive an interest in the property was met.

Respondents also refer to the case of *Sparrow v. Sparrow*.[1] Their brief states that the courts in Louisiana

[1] Sparrow v. Sparrow, 231 La. 966, 93 So.2d 232 (1957).

fail to recognize the principle of law established in the decisions of the Louisiana Supreme Court in the cases of *Viens v. Brickle*, 8 Mart. (O.S.) 11 (1820); *Delamour v. Roger*, 7 La. Ann. 152 (1852), *Malady v. Malady*, 25 La. Ann. 448. This statement is wholly inaccurate. In that case the Supreme Court of Louisiana held that the contributions toward the acquisition of realty were made after the relationship of concubinage began, so plaintiff could recover no interest in the realty for the reason that the motive for the relationship of the parties was concubinage and violated Article 2804 of the Louisiana Civil Code which states that:

> "All partnerships are null and void which are formed for any purpose forbidden by law or good morals. * * *."

Notwithstanding the fact that the majority of the court denied plaintiff's right to recover because the relationship violated said article of the Louisiana Civil Code; yet one member of the court dissented and gave reasons therefor as follows:

> "Undoubtedly, the contributions made by plaintiff toward the accumulation of the assets in question were rendered in business transactions and enterprises independent of the concubinage relationship. This being true I am of the opinion that she is entitled to a one-half interest in the property acquired in decedent's name. Delamour v. Roger, 7 La. Ann. 152; Malady v. Malady, 25 La. Ann. 448; Prieto v. Succession of Prieto, 165 La. 710, 115 So. 911; Heatwole v. Stansbury, 212 La. 685, 33 So. 2d 196, annotation at page 1297 of 31 A.L.R. 2d."

We submit, therefore, the statement made by Respondent's concerning this decision at page 34 of their brief is entirely erroneous and, as a matter of fact, the decision strengthens the previous decisions referred to in the Petition for Writ of Certiorari, pages 30 to 37.

It is true that the courts of Louisiana have held that the relationship of joint adventurers is governed by the principles which constitute and control the law of partnership. This is true under common law and equitable jurisprudence in the common law states as it is in Louisiana; but here we take issue with counsel for Respondents, viz.: At no time has the Supreme Court of Louisiana stated that the relationship of joint adventurers can be established only by a contract in writing by authenticated act under private signature, for the contrary has been said by Louisiana.

As stated (25 Tulane Law Review, 332, 334), the Louisiana courts have "unhesitatingly adopted the common law joint venture concept".

It is true that in Louisiana, as in the common law states, the relationship of joint adventurers can arise only by contract, but in two leading decisions of the Supreme Court of Louisiana it has been said: That relationship shall rest "upon a contract *either* express or implied".[25]

[25] *Dysart v. Sinclair Refining Co.*, 198 La. 9, 6 So.(2d) 341, 345; and *Pillsbury Mill v. Richards*, 131 La. 111, 90 So.(2d) 797, 801.

We find it impossible to imagine an implied contract in writing by authenticated act, for such a contract would be an expressed contract.

Therefore, it is not the jurisprudence of Louisiana or of Mississippi that the contract entitling Stricker to relief as prayed for in his original bill must have been evidenced by formal articles of agreement in writing.

Petitioner's Reply to Respondents' Contention that Stricker is Barred by Prescription and Laches.

Respondents have erroneously contended that Stricker's rights are barred by prescription and laches on the assumption that Stricker's right of action accrued on December 30, 1946 when the Esperanza Plantation was purchased and that he did not thereafter file his suit until October 1955. The predicate upon which Respondents base their argument is false and erroneous in that Stricker had no right to demand any share or interest in the profits of this purchase or in and to the corpus thereof until the property had finally paid for itself as to purchase price and all other items of cost after and by virtue of the sale of some of the timber therefrom on February 10, 1947, to General Box Company. Until this sale in 1947 sufficient proceeds had not been received from the property to cover the initial consideration paid for the property of $26,500.00 and the additional costs and expenses that had been advanced and charged to cost of it by Morgan. It was not until 1947 when the Esperanza timber was sold to General Box Company that the property paid for itself and not

until then was there any profit or division. Hence not until after February 10, 1957 could Stricker have maintained any action for a share in the property itself as profits derived from the purchase. In numerous other instances the parties Stricker and Morgan had continued to leave the status of the title in quo, i.e., vested in Morgan, long after the properties had paid themselves out, thus continuing to manage and operate the properties for the mutual and joint benefits of themselves jointly under their existing agreement; and hence there was no cause, reason or occasion for Stricker to immediately demand conveyance to him or final accounting from Morgan.

Although at one time shortly prior to the sale of the timber to General Box Company Morgan had indicated to Stricker in a conversation that he could not accord to Stricker an interest in the land after all the timber had been cut therefrom, stating as his reason therefor the fact that he and Stricker had verbally agreed with Jake Laub and Bob Graham that after Morgan and Stricker had cut all the timber from Esperanza Laub and Graham would be given an opportunity to purchase the plantation (on which agreement, unbeknownst to Stricker, Morgan had already reneged, as evidenced by Morgan's correspondence with Barchus),[26] yet when by letter Stricker recited and insisted upon the term of the agreement under which Esperanza Plantation had been bought,[27] Morgan withdrew from any positive position if there had been any positive position that

[26] Pl. Ex. 94, p. 2, original sent up.
[27] Pl. Ex. 115, pp. 5-7, original sent up.

Stricker was not entitled fully and equally to the benefits of this purchase by inviting Stricker to discuss the matter with Morgan further.[28]

Never thereafter prior to the institution of this suit did Morgan expressly deny that which is claimed by Stricker in this suit; Stricker and Morgan continued to look after the property; Stricker devoted time in a managerial capacity, seeing to surveys thereof, and etc.; and Stricker likewise continued his efforts after the sale of timber to General Box to dispose of the remaining merchantable timber thereon, and indeed Morgan recognized Stricker's continuing interest and rights in the Esperanza property.[29]

So, with respect to Respondents' contentions regarding laches and prescription, we say that Respondents' position is untenable for the following reasons:

(1) No statute of prescription had run.

(2) Never until shortly before institution of this suit was Stricker apprised that Morgan had

[28] Pl. Ex. 115, pp. 8-9, original sent up.

[29] Pl. Ex. 115, p. 5;
Pl. Ex. 116, pp. 1, 3, 6, 7;
Pl. Ex. 117, p. 3;
Pl. Ex. 119, pp. 1, 4-6;
Pl. Ex. 120, p. 1;
Pl. Ex. 132, pp. 1-5;
Pl. Ex. 133, pp. 1, 3-8;
Pl. Ex. 156;
Pl. Ex. 183;
Pl. Ex. 183;
Pl. Ex. 118, R. Vol. 8, p. 1151;
Pl. Ex. 214, R. Vol. 12, p. 2230;
Pl. Ex. 25, R. Vol. 2, p. 240, R. Vol. 3, p. 473;
Pl. Ex. 27, R. Vol. 2, p. 327, R. Vol. 3, p. 474;
Pl. Ex. 158, pp. 2, 4, 6, 8, 10, 15.

dealt adversely to the interest of Stricker by making certain deeds of gift and donations of royalties to members of his family.

(3) Never until the institution of this suit did Morgan affirmatively and conclusively deny Stricker's claim; but, rather, Morgan led Stricker on by inferring that Stricker would eventually receive his one-half interest in the Esperanza Plantation.

(4) To the time of the institution of this suit Morgan had suffered no good faith change in position, but, rather, had only gratuitously conveyed interests in royalties or minerals to members of his immediate family.

(5) Whereas it is true that by the time this case finally came on for trial on the merits Morgan had been adjudged an interdict, yet when the suit was filed Morgan was of sound mind, was in good health and did not become ill until more than two months after this suit was filed (a circumstance which could not have been foreseen by Stricker), and suffered no mental impairment until many months thereafter. The only possible witnesses lost to Morgan or to Stricker were, by the death of Jake Laub (June 30, 1949) and Charles Barchus (November 2, 1942), who might have testified as to the conversation that occurred between Stricker and Morgan in John Dale's office when Laub and Graham withdrew as purchasers of Esperanza. There is nothing in this record to indicate that Laub or Barchus would have testified favorably to Morgan. The contrary is indicated.

The Louisiana courts have consistently held that mere silence and delay could not cause a loss of title to property except by the effect of the laws or prescription.

Long v. Chailan, 187 La. 528, 175 So. 49; Dugas v. Powell, 207 La. 316, 21 So. (2d) 366, 373.

It is established that under the jurisprudence of the State of Louisiana, as is true under the jurisprudence of Mississippi, co-owners cannot prescribe against each other.

Williams v. Harrell, (1913), 132 La. 1, 60 So. 699; Bornio v. Berger, (1925), 1 La. App. 482, judgment affirmed, 158 La. 915, 105 So. 11

The *Bornio* case (*supra*) is particularly important since there the title had been taken for convenience in the name of St. Amand of whom the defendants were heirs, but St. Amand had given plaintiffs an unrecorded counter-letter. The defendants pleaded the ten-year and thirty-year codal provisions of prescription, which were held by the court to be without foundation or fact and hence inapplicable since the defendant or his heirs had never possessed to the exclusion of the plaintiffs. *Morgan has never here possessed to the exclusion of Stricker.*

Thus we submit that inasmuch as under no circumstances could Stricker have brought this suit until after February 10, 1947, the ten-year statutes of prescription of Louisiana cited by Respondents have no application to this case.

This action was brought well within any prescriptive period of time applicable to the Petitioner's cause of action.

Aside from the bar of a statute of limitations, "laches" in a legal sense is not merely delay but delay that results in injustice or disadvantage to another who himself is in good faith, and time is only one element. There must be some element of estoppel or change in condition or relation of parties or intervention of rights of third persons who are themselves innocent and in good faith so that it would be inequitable to permit the party to then assert his rights.[28]

The application of the doctrine of laches is controlled by equitable considerations. *It cannot be invoked to defeat* justice, and will be applied only where enforcement of the rights asserted would work injustice.[29]

A plea of laches is not favored predicated upon an alleged delay short of the statutory period of limitation or prescription.[30]

[28] Sample v. Romine, 193 Miss. 706, 8 So.(2d) 257, suggestion of error overruled, 9 So. (2d) 643, judgment corrected 10 So. (2d) 316. See also Mobile & Ohio R. Co. v. Swain, 162 Miss. 825, 115 So. 627; Brown v. Alexander, 118 Miss. 548, 79 So. 452; Labarre v. Rateau, 210 La. 31, 26 So. (2d) 279.

Labarre v. Rateau, supra.

[29] Pons v. Yazoo & Mississippi Valley R. Co., 131 La. 313, 59 So. 721, appeal dismissed (1914), 232 U. S. 720, 34 Sup. Ct. 602, 58 L. Ed. 814; Smith v. Smith, 211 Miss. 481, 52 So. (2d) 1; Waldrop v. Whittington, 213 Miss. 567, 57 So. (2d) 238, Dampier v. Polk, 214 Miss. 65, 58 So. (2d) 44; Gault v. Brannon, 222 Miss. 111, 75 So. (2d) 439, White v. Merchants & Planters Bank (Miss.), 90 So. (2d) 11.

Counsel for Respondents cite in their brief the case of "*Comans v. Tapley*, 57 So. 567 (1912)", omitting to mention that that was not a decision by the Supreme Court of Louisiana but was one by the Supreme Court of Mississippi, the official report being 101 Miss. 204. The opinion of the court of Mississippi sustaining a suggestion of error in the case of *Comans v. Tapley* cited by Respondents is not here applicable, for therein it was stated, "The power of a court of equity to enforce the doctrine of laches, where the delay is for a period less than the time required by the statute of limitation, is not here involved, for the reason that the longest period of time prescribed by any statute of limitations has four times passed since the decree was rendered". The enforcement of a decree rendered more than forty years prior to institution of the Comans' suit was the subject of that litigation.[1]

Much less than the prescriptive period of time had elapsed from the time when Stricker might first have brought his action to the date he instituted this suit.

Likewise the case of *Marks v. Toney* cited by Respondents, giving only the Southern Reporter citation and not the official report, was a decision by a Mississippi court and not a Louisiana court, as this Court might be led to believe without looking to the books themselves, the official report of that case being 196 Miss. 572. The court in *Marks v. Toney* was dealing with a situation where the longest period of limitation or prescription that was applicable, if any were appli-

[1] *Comans v. Tapley*, 57 So. 567, 573.

cable to the situation, was either the three year statute of limitations applicable to acts or the six year statute applicable to an obligation for payment evidenced by a writing, whereas eleven years had elapsed since the right of action had accrued. The court in effect held that laches might be invoked in instances of long or protracted delay working to the disadvantage of another "although no expressed statute of limitations is available", unless facts are shown which will rebut the presumption of injustice arising out of the apparently undue delay, or which will excuse the same.

In the case now presented to this Court upon Application for Writ of Certiorari, Stricker's claim could not have been barred by Louisiana prescription or Mississippi limitation until the year 1957. This record is replete with documentary evidence explaining such delay as did occur before the filing of the suit and justifying whatever delay there was in the filing of it, viz.:

The record shows that in January 1945 there was correspondence between Stricker and Morgan discussing the respective rights of the parties in the Esperanza Property but those discussions were not brought to any final determination and at that time Morgan had not recovered, as he was entitled under the contract, all of his costs of purchase of the property. It was not until the year 1947 that Morgan recovered the costs principally from the sale of some of the timber, the profits from which timber sale were then divided equally between the parties, that Stricker had a right to demand by way of accounting and division of the profits a deed to

himself from Morgan to a one-half interest in the remainder of the property, i.e., the land and all remaining timber thereon. As this record discloses, in every other instance where land had been purchased, for convenience title was permitted to remain in Morgan for some years after Morgan had recovered his costs and after other profits therefrom had been divided.—the parties continuing to manage and control the same for their mutual benefit under the general supervision and management of Stricker for the purpose of farming same in some instances, raising cattle thereon, harvesting timber therefrom, etc., and in every instance with the exception of Esperanza Morgan ultimately deeded to Stricker one-half of the interest in the land. During the time that elapsed from the timber sale in 1947 to the time of institution of this suit, the record discloses that Stricker with the collaboration of Morgan continued to look after this Esperanza Plantation property, protecting its lines, procuring surveys to be made, negotiating pipe line rights-of-way and resultant damages to the property, making inspections of it (occasionally together) and participating in the negotiation for the drilling of directional wells to be bottomed on other lands. It was not until Stricker discovered by matter of record that Morgan had dealt with this land adversely to him in 1952 by making donations of royalty to members of his (Morgan's) family that it became apparent to Stricker that he must institute this action to protect his rights. At the time he instituted his suit Morgan was in good health and Stricker could not foresee the subsequent illness suffered by Morgan or the ravages

of the disease which would, as it did, impair Morgan's mental capacities.

Respondents contend that upon the sale of the timber Stricker refused to "pay any part of the expenses attributable to the Esperanza land". This we dispute. Stricker and Morgan proposing at the time of the timber sale to divide to that time only the profits from the sale of the timber, Stricker did no more than request an accounting at that time of costs deductible from the profits of that sale for his income tax payment purposes.[34]

Other erroneous factual statements contained on page 22 of Respondents' brief have elsewhere been answered herein by Petitioner.

Reply of Petitioner to Respondents' "Position 4".

The argument made unto this "Position" by Respondents deals strictly with the question of whether the relationship of partnership existed between these parties.

It is not essential to Petitioner's right to relief in this case that the relationship between himself and Morgan be adjudicated to have been a partnership relationship or to have been, for that matter, a relationship of joint adventurers. Stricker is entitled to his relief under general principles of equity, which are recognized and in proper cases will be accorded to a complaining party under the jurisprudence not only of Mississippi but also

[34] Appendix 2504B, p. 80.

of Louisiana (Civil Code, Article 21), so we come to a discussion of the factual assertions made by Respondents on pages 23 and 24 of their brief, all of which, we say, are untrue, as this record discloses, viz.:

1. No separate consideration was paid for the timber upon the purchase of Esperanza Plantation. See that set forth on page 17 of the Petition for Writ of Certiorari.

2. The timber was not acquired separately from the land. It was acquired by one deed from Campbell. See Appendix 2504-B, page 21.

3. Morgan did not procure the timber to be assessed separately from the land or to have the ad valorem taxes prorated between the timber and the land. The facts are that under the law of Louisiana land was assessed by evaluating several elements thereof, i.e., the acreage of the land inside the levee, the acreage outside the levee, the improvements on the land, the standing timber thereon, etc., and the assessments had been so handled prior to the conveyance by Campbell to Morgan and, in accordance with the law regulating assessments, were similarly handled thereafter. See Appendix 2504-B, pages 91, 92 and 93. Indeed, when Morgan's attention was called to the fact that for tax assessments the timber was evaluated by the assessor and the acreage was evaluated by the assessor to make up the total evaluation upon which the tax levy was laid, he stated in a letter to Stricker dated May 19, 1947, "As to taxes, I have never seen the tax receipts. I only went by the total charges on the ledger. If anyone would have told me they were charged separately like

that I would not have believed it". See Appendix 2504-B, page 89. We consider this contention by Respondents utterly unfair and lacking in good faith, for those exhibits were well known to Respondents.

4. The parties did not treat the timber as a separate and distinct transaction from the land, initially or subsequently. Initially the parties had intended to purchase timber only. They could not purchase the timber without purchasing the entire fee, land and all. The entire fee accordingly was purchased by one deed. Thereafter Stricker negotiated the oil lease, requiring special provisions therein and seeking additional special provisions. Included amongst these special provisions Stricker was desirous of having the oil lease contain no covenant of warranty of title or acreage and to provide that "shut-in-gas well with a resultant annual payment of only $50.00 should not perpetuate the lease against an annual delay rental of $1250.00". Stricker saw to the proper execution of the lease, its delivery and the collection of the cash consideration for it and its transmittal to Morgan, having an interest therein, for its credit against the cost as had been done by him in other like transactions. Morgan considered only one-half of the cash consideration for the lease and subsequent delay rent payments as being his own and accordingly on his income tax returns accounted for only one-half of the totals. Stricker by supervision protected the property and its boundaries, negotiated for the sale of timber therefrom and procured surveys of the boundaries and of areas of timber dam-

> age, for the cost of which Stricker and Morgan each bore one-half of the cost. Morgan recognized Stricker's one-half interest in the Esperanza Plantation property (land and all) when by dictation he had his secretary make a bid in the name of Morgan's Louisiana Box & Lumber Company for the timber on the land by letter addressed to both Stricker and Morgan and describing the same as "now standing and being upon the Esperanza Plantation and now owned by you". See Appendix VII to Petition for Writ of Certiorari, page 58 (Plaintiff's Exhibit 118). As he had previously so recognized by his other communications in writing.[35]

The Respondents in their brief have said that "the Louisiana cases recognized that Act 188 of 1904 created two distinct estates—one in the land and one in the timber". This is not a correct statement of the law. All that the said Act 188 did was to provide that when the fee owner of land has made a conveyance of the standing timber thereon to another person the "standing timber shall remain an immovable (continue as in common law states to be realty) and be subject to all of the laws relative to immovables, even when separated in ownership from the land on which it stands"—until it is actually severed from the land, thereby becoming personalty or a movable property. In the case at bar, the fee (land, timber, minerals, everything)

[35] See letter Dale to Morgan, September 16, 1941, Pl. Ex. 34, Appendix VII to the Petition for Writ of Certiorari, p. 57. Morgan's reply to Dale of September 23, 1941 in which Morgan said "I will take same up with our good friend Mr. Stricker who is a partner in this buy", Appendix 2504-B, p. 37, and see also letters in Appendix 2504-B, pages 39, 47 and 49.

was conveyed into the name of Morgan by the deed from Campbell, insofar as the conveyance records of Concordia Parish, Louisiana are concerned. There was never any subsequent record separation of ownership of timber from land. There is no evidence whatsoever in this record that Stricker's rights should be limited to the standing timber or to the profits from it, and there is no evidence but that the parties were to have the same rights in this purchase respectively as they had in the other transactions entered into pursuant to their original agreement.

No separate estate in timber as distinguished from land ever having been created, the fact that Stricker and Morgan did divide the net proceeds of the timber sale is convincing evidence of Stricker's rights *ab initio* in the land (the entire immovable) by its acquisition by the deed from Campbell. Great emphasis is supplied to this by the admission of record that by such purchase Stricker acquired a one-half interest in the timber despite the unsupported contention of the Respondents that under Louisiana law he could not therefore have acquired a one-half interest in the land itself.

Agreement to Share Profits and Losses.

Respondents on pages 28 and 29 of their brief make the following statements:

> "Nor does this record show the creation of a profit and loss sharing contract or agreement. None such existed. Obviously, all that occurred was that Petitioner Stricker brought to Respondent Morgan

a deal (Walnut Grove) which Respondent Morgan decided to finance."

* * * * * * *

"*There is nothing in this record to show a general agreement to share in the profits and losses equally.* It was pointed out by the Trial Court and the Circuit Court in considerable detail the many different arangements made by the parties in the various deals and we will not now repeat them."

There is absolutely no truth in these statements made by Respondents in their brief. In a letter to Petitioner dated October 28, 1943, by Morgan, we find the following language:

"* * * It was my opinion all along that we stood the losses and the gains."[9]

This representation on the part of Respondents which is so contrary to the facts proved by the record is typical of a large portion of the claims made by Respondents in their brief filed in opposition to Petitioner's Application for Writ of Certorari.

Previously Morgan had reminded Stricker of their original agreement which was the basis of all of their transactions for purchase of lands and timber when by his letter of August 8, 1942 to Stricker, he said:

"Remember our origifial agreement on every deal that we made at the start * * *"[10]

[9] Appendix 2504-B, pages 1 and 2
[10] Appendix 2504-B, page 3

With shocking lack of credentials to be gleaned from anything in this record, Respondents now, belatedly, seek to avoid the damning effect of Morgan's written admissions against interest by weakly stating (page 31 of Respondents' opposition) that "frequently" Morgan's "use (of the word "we" and "us") was occasioned by Respondent Morgan's inclusion of his partners in Louisiana Box in some instances and with his son alone in others".

We have searched the record exhibits to find one reference by Morgan, in any communication whatever, to his "partner" son, Eddie, or his "partner" bookkeeper, Fred N. Owen, or to his "partnership" of Louisiana Box & Lumber Company as having any interest whatsoever in the fee of, or in the timber on, Esperanza Plantation. We *find none;* and *this Court will find none.*

Son Eddie has stipulated that he knows nothing and never knew anything whatsoever pertaining to the facts and subject matter involved in this litigation.[a]

Bookkeeper Owen testified that he has no claim to any interest in this property; that the land was never an asset of Louisiana Box & Lumber Company; and that the only entries originally made on the books of Louisiana Box & Lumber Company were of the two checks which Morgan had him issue to pay, in part, for the Esperanza purchase, which checks were promptly charged off "to log costs", and that later upon an audit he was required to charge the amounts thereof to

[a] R. Vol. 5, p. 871

Morgan, individually. Therefore, the standing timber was never carried as an asset of the Box Company.[39]

The Box Company later bid for some of the timber in 1947, as being on property belonging to Stricker and Morgan.[40]

Only for income tax payment benefits does it appear that Morgan treated his son, Eddie, as having some interest in this property, and only for income tax payment benefits does it appear that long after the sale of timber to the General Box Company did Morgan have his share of the profits from such sale entered on the books of his Lumber Company and charged same against himself. Only after oil was being produced from Esperanza did Morgan pay his share of such profits into funds of his Box Company.[41]

We feel justified in charging that all this "finagling" of Morgan's ledgers and his Box Company records was a part of his scheme to defraud Stricker of his just dues.

Stricker and Morgan were the only persons who were interested in the purchase of Esperanza, either land or timber. They were the only persons to whom, in context, Morgan can be said to have referred when in his letters (written declarations against interest) he made references to "we", "us", "ours", and the like.

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[39] R. Vol. 6, pp. 1174-1188; R. Vol. 7, p. 1261; R. Vol. 9, pp. 1707-1713.

[40] Appendix VII, p. 118.

[41] R. Vol. 7, pp. 1261-1274; R. Vol. 9, pp. 1711-1723; R. Vol. 10, pp. 1856-1862; R. Vol. 7, pp. 1328-1330; R. Vol. 10, p. 1874, and exhibits referred to therein.

We think that elsewhere herein and in our Application for Writ of Certiorari we have answered the other factual contentions of Respondents set forth on pages 27-33 of Respondent's brief, with all of which we take issue.

Counter-Letter.

The statement of Respondents on page 38 of their brief is an attempt to lead the Court to believe that under the law of Louisiana a counter-letter, to be effective, must be executed in the same manner as the instrument which it affects and must follow some particular form. Such is not the law of Louisiana.

Louis v. Garrison, 64 So.(2d) 254, (La. App., Orl. 1953); *Morgan v. Hathaway*, 77 So.(2d) 169 (La. App. 1st Cir. 1955);
Tulane Law Review, Vol. 17, p. 462;
Succession of Curtis, 100 So. 412 (Sup. Ct. La. 1924, 156 La.)

CONCLUSION.

Wherefore, Petitioner does most earnestly submit that in this case the Court of Appeals has decided a most important state question in a way that is in conflict with the applicable state law. In this case the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of super-

vision. Hence Petitioner submits that the Writ of Certiorari should be granted as prayed.

Respectfully submitted,

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CERTIFICATE.

I, the undersigned, Edwin Leland Richardson, do hereby certify that I have on this date transmitted a copy of the above and foregoing Brief of Petitioner, R. M. Stricker, to each of the attorneys of record for the Respondent, J P. Morgan, et al., addressed to them at their respective post office addresses as shown of record herein, namely, Messrs. William H. Talbot, Attorney at Law, 808 Whitney National Bank Building, New Orleans, Louisiana and C Delbert Hosemann, Attorney at Law, Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi.

This the day of February, 1960.

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